U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-[redacted]

DATE: NOV. 15, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, [redacted], seeks to employ the Beneficiary as a software engineer. It requests her classification under the third-preference immigrant category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the accompanying certification from the U.S. Department of Labor (DOL) does not describe the offered position.

On appeal, the Petitioner argues that the Director violated U.S. Citizenship and Immigration Services (USCIS) policy because the labor certification states job duties "essentially identical" to those of the offered position.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL certification signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested classification. If USCIS grants a petition, a foreign national may finally apply for an

immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications in a shortage occupation, a petition for a professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). A labor certification remains valid only for the particular job opportunity, foreign national, and geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). If a job opportunity changes during a petition's pendency, the validity of an accompanying labor certification may expire. *Matter of United Inv. Grp.*, 19 I&N Dec. 248, 249 (Comm'r 1984).

For a job offer to remain as DOL-certified, "the facts of employment or intended employment must remain as stated and the specific employer-employee relationship stipulated and intended must continue both in present fact and prospectively." *Id.* USCIS must assess a petition "to ensure that the position offered is the same or similar position that was certified by the DOL." Memorandum from Michael Aytes, Acting Assoc. Dir., Domestic Ops., *AFM [Adjudicator's Field Manual] Update: Chapter 22: Employment-based Petitions (AD03-01)*, HQPRD70/23.12 6 (Sept. 12, 2006), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/afm_ch22_091206r.pdf (last visited June 11, 2019).

Here, the accompanying labor certification identifies the offered position as "Software Engineer" and lists the following job duties:

> Design, develop and integrate cutting-edge software technologies. Develop code that provides functional enhancements to platform utilized by [the Petitioner] to gather public[ly] available data across a wide [] range of data sets over the Internet. Aggregate, normalize and streamline data so that it can be used in a highly-scaled, optimized fashion to enhance various features and functionalities. Learn the existing code base, understand development environment and processes, work with cross-functional teams, and document her work.

The Director's written request for additional evidence (RFE), however, noted that the petition identifies the offered position by a different job title, "Software Engineer (Senior)," and does not specify the job's duties. The Director therefore found that she could not determine whether the Petitioner offered the Beneficiary the DOL-certified position.

In response to the RFE, the Petitioner submitted a letter from a company official indicating that, since the labor certification's issuance, the company twice promoted the Beneficiary. The Petitioner first promoted her from the offered position of software engineer to "Senior Software Engineer." The letter states that the company later elevated her to the position of "Staff Software Engineer." The official stated that, despite the promotions and differing job titles, the job duties of all three of the Beneficiary's positions are "essentially identical." The official's description of the Beneficiary's most recent job deletes the word "Design" in the first sentence of the description on the labor

certification and adds the following job duty: "Mentor junior engineers and aid them in the learning and career development process."

The Director concluded that the Petitioner no longer offers the Beneficiary the same position described on the labor certification. The Director stated: "Unfortunately, essentially the same is not the same." As the Petitioner argues, however, USCIS policy is more lenient. An offered position may be "the same *or similar*" to a position on a labor certification. Aytes Memo, *supra*, at 6 (emphasis added). Here, the Petitioner demonstrated that the job duties of the offered position vary only slightly from those certified by DOL. Contrary to the Director's decision, we therefore find that the minor changes in the offered position's job duties alone do not render the labor certification invalid. We will therefore withdraw the Director's decision.

Whether the labor certification remains valid for the offered position, however, requires consideration of additional factors. The labor certification process requires an employer to test the labor market by placing advertisements for an offered position and soliciting applications from U.S. workers. *See* 20 C.F.R. § 656.17(e) (stating requirements for "pre-filing recruitment" of job opportunities). DOL "makes a determination either to grant or deny the labor certification on the basis of whether or not . . . [t]here is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity." 20 C.F.R. § 656.24(b)(2). Thus, "[t]he outcome of this labor market test is of paramount importance." *See, e.g., Zodiac Solutions*, 2015-PER-00179, slip op. at *3 (BALCA Feb. 22, 2019). Accordingly, DOL has specific advertising requirements. For example, an ad for an offered position in a newspaper or professional journal must "[n]ot contain wages or terms and conditions of employment that are less favorable than those offered to the alien." 20 C.F.R. § 656.17(f)(7).

Here, the Petitioner stated that, after the approval of the labor certification application, the Beneficiary received two promotions. The labor certification states the proffered wage of the offered position as $115,000 to $155,000 a year. The petition states that the Petitioner will pay the Beneficiary "at least $115,000 per year." But the Petitioner has not specified exactly how much the Beneficiary will receive. Thus, for example, if the Petitioner's newspaper ads stated that the offered position pays $115,000 to $155,000 a year and the company now is offering a job with a starting salary of more than $155,000 a year, the labor certification would not remain valid. The Petitioner would have violated DOL regulations by advertising wages less favorable than those offered to the Beneficiary. *See* 20 C.F.R. § 656.17(f)(7).

The Petitioner bears the burden of demonstrating its eligibility for the requested benefit. *See* section 291 of the Act; 8 U.S.C. § 1361. But the Director did not notify the Petitioner of the need for additional evidence to determine the validity of the labor certification for the offered position. We will therefore remand the matter.

On remand, the Director should issue a notice asking the Petitioner to provide evidence of the salary offered for the position described as staff software engineer. We note that the job offered is prospective and does not necessarily have to be the position in which the Beneficiary is currently employed. However, in this case, the Petitioner has indicated that it intends to employ the Beneficiary in the position of staff software engineer, rather than in the position of software engineer

or senior software engineer. The Petitioner must demonstrate that the labor certification remains valid for the position in which they intend to employ the Beneficiary.

The Director should also provide the Petitioner with a reasonable period to gather and submit the required documentation and information. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

Alone, the minor changes in the offered position's job duties do not render the accompanying labor certification invalid. The record, however, requires further development to determine the certification's continued validity.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of L-*[redacted] ID# 4899325 (AAO Nov. 15, 2019)